Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

PETER HOUSTON, PETITIONER

v.

ARAMARK CORPORATION; 1984 STOCK OPTION PLAN OF THE ARAMARK CORPORATION; ARAMARK OWNERSHIP PROGRAM AND ARAMARK; BENEFIT PLAN ADMINISTRATOR

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Third Circuit affirmed the district court decision which held that the stock option plan involved in this case was not an ERISA plan. Subsequent to the district court's decision, but prior to the Third Circuit's consideration of this case, the Court issued its opinion in *Yates v. Hendon*, 541 U.S. 1, 124 S.Ct. 1330, 158 L.Ed.2d 40 (March 2, 2004). *Yates* dealt with the basic issue as in our case, *i.e.*, the coverage provisions of ERISA applicable to the facts of each case. The Court in *Yates* discussed and relied on a Department of Labor Advisory Opinion which was directly applicable to the facts in that case. The Sixth Circuit opinion in *Yates* did not even mention the DOL Advisory Opinion. Reversing the Sixth Circuit, the *Yates* opinion states that the Department of Labor's view expressed in the Advisory Opinion "merits the Judiciary's respectful consideration." In this case, as in *Yates*, there is a DOL Advisory Opinion directly applicable to the facts. In his briefs filed with the Third Circuit, petitioner discussed the significance of the Court's precedent in *Yates* regarding the consideration to be given to an applicable DOL Advisory Opinion. The opinion of the Third Circuit did not mention either *Yates* or the applicable DOL Advisory Opinion. The question presented is as follows:

> Whether a Court of Appeals can ignore a Supreme Court case which directs that an applicable Department of Labor Advisory Opinion merits the Judiciary's "respectful consideration."

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OPINIONS BELOW

The Third Circuit's October 1, 2004 decision is reported as *Houston v. Aramark Corp.*, 112 Fed. Appx. 132, 2004 WL 2203981, C.A. 3 (Pa.), 2004. Neither the District Court opinion nor the Third Circuit's denial of Mr. Houston's petition for rehearing en banc are reported.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The Third Circuit's Order and Opinion were filed on October 1, 2004 (1a). Mr. Houston's petition for rehearing *en banc* was denied on November 22, 2004 (15a).

STATUTORY PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974, §3(2)(A)(i), 29 U.S.C. §1002(2)(A)(i), provides in pertinent part that "the terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund or program . . . established or maintained by an employer . . . to the extent that by its express terms or as a result of surrounding circumstances such plan, fund or program (i) provides retirement income to employees."

STATEMENT OF THE CASE

Facts

Peter Houston worked at Aramark for over 29 years as a management employee until he retired on June 1, 2001. Throughout that time, Aramark was a privately held corporation, the shares of which were not publicly traded. During his career there, Mr. Houston acquired shares of restricted Aramark stock through the company's stock option plans. He held those shares subject to the terms of Aramark's Stockholders' Agreement. The question was whether, under the "surrounding circumstances" here involved, the stock option plan can be viewed as an ERISA plan because of the specific provisions that provided retirement income.

Under the Stockholders' Agreement, an employee could sell his option shares only to Aramark or to a company-approved transferee, but neither Aramark nor any of its approved transferees had an obligation to buy his shares.

In the event of a shareholder's retirement however, the situation was different. Through a "put" mechanism in the Stockholders' Agreement, a stock option shareholder had the right to *require* the company to purchase 30% of his shares at the time of his retirement. In its Q & A section, the Prospectus explained this mechanism as follows:

> "Will I be able to require Aramark to repurchase my shares?
>
> "Generally, no. However, upon your death, complete disability, or normal retirement, you or your estate, as appropriate, and subject to our financing

> agreements, can require us to purchase up to 30% of your shares. This right to require us to purchase shares is described as a Put."

Under the Stockholders' Agreement, the company could call the shares of a stock option shareholder at any time during the decade following (but not before) such shareholder's last day of employment.

At the time of Mr. Houston's retirement, Aramark's top management knew that it was about to announce an initial public offering ("IPO") of its stock that would result in a substantial increase in the value of Mr. Houston's shares. Mr. Houston did not have this information.

Aramark was free to delay its call of Mr. Houston's shares until *after* its upcoming IPO announcement. But it chose, instead, to call those shares on June 14, 2001, before the IPO announcement, at the internal market price of $20.80 per share. The purchase of Mr. Houston's shares closed on June 29, 2001.

On July 17, 2001, Aramark announced its IPO and the value of a share of Aramark stock rose to $46. On the same day, in keeping with SEC rules, the company retroactively cancelled its internal market for the period from June 15, 2001 to July 17, 2001. This period included the June 29, 2001 closing on Mr. Houston's stock option shares. Aramark paid the $46 share price to other shareholders for stock it purchased on and after June 15, 2001. Accordingly, if Aramark had waited to call Mr. Houston's shares until after the IPO announcement, or if it had applied the same retroactive June 15, 2001 effective date to value Mr.

Houston's shares,[1] it would have paid him the market price of $46 per share, instead of the internally set price of $20.80 per share. In essence, Aramark made a bargain purchase of Mr. Houston's shares at Mr. Houston's expense.

Case History

Mr. Houston filed the case below on June 13, 2003. His Amended Complaint included a count under ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), for review of Aramark's denial of his ERISA claim, thereby invoking the federal question jurisdiction of the District Court.

Aramark moved to dismiss Mr. Houston's Amended Complaint. On the ERISA claim, Aramark argued that its stock option plan was not an employee pension benefit plan as defined by ERISA. In our memorandum in opposition, we cited an on-point Department of Labor Advisory Opinion about a comparable stock option plan, which held that the plan *could* be an ERISA plan under the surrounding circumstances test, depending on the facts.

The district court granted Aramark's motion to dismiss on December 15, 2003. (10a-14a) Basing its decision on pre-*Yates* cases that reject ERISA coverage of stock option plans as a matter of law, it held that ERISA did not cover Aramark's stock option plan (13a). The district court gave no consideration to the

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[1] Aramark declined to apply the retroactive market cancellation date to its purchase of Mr. Houston's shares on the grounds that he had signed a release. However, the release was in exchange for an actuarially equivalent payout amount, so that he received no consideration for the release.

countervailing DOL Advisory Opinion. By ignoring the DOL Advisory Opinion, the district court precluded Mr. Houston from obtaining appropriate compensation -- approximately $3,000,000 at issue -- pursuant to ERISA. Mr. Houston filed a timely Notice of Appeal on January 12, 2003.

In an unpublished opinion filed on October 1, 2004, the Third Circuit affirmed the judgment of the district court (1a-9a). Although Mr. Houston argued to the Third Circuit that this Court's decision in *Yates v. Hendon* required it to give respectful consideration to the applicable DOL Advisory Opinion, the Third Circuit made no mention of *Yates*, and gave no consideration at all to the DOL Advisory Opinion.

Mr. Houston therefore petitioned the Third Circuit for rehearing *en banc* in light of *Yates*. The petition was denied on November 22, 2004 (15a).

REASONS FOR ALLOWANCE OF THE WRIT

REVIEW IS NECESSARY TO MAINTAIN THE HIERARCHY OF THE FEDERAL COURT'S SYSTEM WHICH REQUIRES THAT A COURT OF APPEALS MUST FOLLOW THE PRECEDENT OF A SUPREME COURT DECISION.

This petition for certiorari rests solely on the ground that the Third Circuit's opinion totally ignored this Court's holding in *Yates v. Hendon*, 541 U.S. 1, 124 S.Ct. 1330, 158 L.Ed. 2d 40 (March 2, 2004). In *Yates*, Justice Ginsburg stated the issue as follows:

> "This case concerns the definition and coverage provisions of Title I [of ERISA] . . . indicating who may participate in an ERISA-sheltered plan . . . ." 124 S.Ct. at 1336.

Both this case and *Yates* involve the same basic issue, *i.e.*, whether the coverage provisions of ERISA are applicable to the facts in each case. In *Yates*, there was an applicable Department of Labor Advisory Opinion which expressed the Department's position on ERISA coverage for the precise substantive issue involved in that case. In our case, there is also an applicable DOL Advisory Opinion which expressed the Department's position on ERISA coverage for the precise substantive issue involved in this case.

In *Yates*, the Sixth Circuit's opinion did not even mention the applicable DOL Advisory Opinion. Similarly, in our case the Third Circuit's opinion did not even mention the applicable DOL Advisory Opinion. But more importantly, *Yates* was not mentioned in the Third Circuit's opinion. The *Yates* decision was

explicitly discussed in the two briefs filed by petitioner with the Third Circuit. Both of petitioner's briefs also called specific attention to the DOL Advisory Opinion applicable to the precise situation presented to the Third Circuit. The DOL Advisory Opinion involved in our case (Advisory Opinion No. 90-17A) stated the Department's position that an employee stock option plan can be viewed as an ERISA pension plan, pursuant to ERISA's language,

> "to the extent that by its express terms *or as a result of surrounding circumstances such plan*, fund or program (i) provides retirement income to employees." ERISA §3(2)(A)(i), 29 U.S.C. §1002(2)(A)(i) (emphasis added)

This is the substantive issue in this case.

In *Yates*, Justice Ginsburg's opinion for the Court emphasized the importance of the DOL Advisory Opinion, as follows:

> "This agency view . . . reflects a 'body of experience and informed judgment to which, the courts and litigants may properly resort for guidance.'"

124 S.Ct. at 1342. Justice Ginsburg's opinion further stated:

> "This agency [Department of Labor] view, overlooked by the Sixth Circuit . . . *merits the Judiciary's respectful consideration.*"

Ibid. (emphasis added).

The Third Circuit ignored Justice Ginsburg's direction. Instead of "respectful consideration", the Third Circuit gave no consideration to the applicable DOL Advisory Opinion.

This failure of the Third Circuit to give "respectful consideration" to the DOL Advisory Opinion required by *Yates* directly conflicts with this Court's holding in *Hutto v. Davis*, 454 U.S. 370, 374-75, 102 S.Ct. 703, 706, 70 L. Ed. 2d 556 (1982):

> "More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress. Admittedly, the Members of this Court decide cases 'by virtue of their commissions, not their competence.' And arguments may be made one way or the other whether the present case is distinguishable, except as to its facts, from *Rummel* [the Supreme Court precedent]. But unless we wish anarchy to prevail within the federal judicial system, *a precedent of this Court must be followed by the lower federal courts* no matter how misguided the judges of those courts may think it to be." (emphasis added)

In our case, the Third Circuit ignored this Court's decision in *Yates* which prescribed "respectful consideration" to be given to an applicable Department of Labor Advisory Opinion on ERISA coverage. A lower federal court cannot overrule a decision of this

Court.[2] We respectfully submit that ignoring a decision of this Court is a far more egregious violation of this Court's constitutional authority and supervisory role than an opinion of a lower federal court which fails to follow a precedent of this Court on the grounds that the cases are distinguishable.

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[2] *Thurston Motor Lines, Inc. v. Jordon K. Rand, Ltd.*, 460 U.S. 533, 535, 103 S.Ct. 1343, 1344, 75 L.Ed. 2d 260 (1983): "Needless to say, only this Court may overrule one of its precedents. Until that occurs, *Rice* [precedent case there involved] is the law, and the decision below cannot be reconciled with it."

CONCLUSION

Petitioner respectfully requests that the Court order that the judgment of the Third Circuit is vacated and the case is remanded to the Third Circuit for further consideration in light of *Yates v. Hendon.*

Respectfully submitted,

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February 18, 2005

(any footnotes trail end of each document)

Case No: 04-1103
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETER HOUSTON,
Appellant

v.

ARAMARK CORPORATION; 1984 STOCK OPTION PLAN OF THE ARAMARK CORPORATION; ARAMARK OWNERSHIP PROGRAM AND ARAMARK; BENEFIT PLAN ADMINISTRATOR

September 30, 2004, Submitted Pursuant to Third Circuit LAR 34.1

October 1, 2004, Filed

NOTICE: RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

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For ARAMARK, 1984 STOCK OPTION PLAN OF THE ARAMARK CORPORATION, ARAMARK OWNERSHIP PROGRAM AND ARAMARK, BENEFIT PLAN ADMN, Appellees: Steven R. Wall,

Amy R. Promislo, Morgan, Lewis & Bockius, Philadelphia, PA.

JUDGES: Before: RENDELL, FUENTES and SMITH, Circuit Judges.

OPINIONBY: SMITH
OPINION: OPINION OF THE COURT

SMITH, Circuit Judge.

Retired employee Peter Houston sued the Aramark Corporation, its 1984 Stock Option Plan, its Ownership Program, and the Aramark Benefit Plan Administrator (collectively, Aramark) after Houston learned that the company stock he sold to then-privately held Aramark roughly doubled in value approximately six weeks later upon the corporation's announcement of an initial public offering. Houston asserted two claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et seq, and one state common law claim. Aramark moved to dismiss Houston's amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), and the District Court dismissed all counts. For the reasons stated below, we affirm the judgment of the District Court.

The District Court had federal question jurisdiction over the ERISA claims, 28 U.S.C. § 1331, and supplemental jurisdiction over the state law claim, 28 U.S.C. § 1367. See Henglein, et al. v. Informal Plan for Plant Shutdown Benefits for Salaried Emples., 974 F.2d 391, 397-98 (3d Cir. 1992) (noting that once federal law is invoked, the facts alleged and their legal sufficiency are questions on the merits, and that "after disposal of a

federal claim, a district court has discretion to hear, dismiss, or remand a supplemental claim for which there is no independent basis for federal subject matter jurisdiction"). We have jurisdiction under 28 U.S.C. § 1291.

I. Background

Houston worked for Aramark for nearly thirty years before retiring from his executive position in June 2001. During his tenure, Houston entered into two stock option agreements with Aramark, the 1984 Stock Option Plan (1984 Plan) and the Aramark Ownership Program (ISPO). At the time of his retirement, Houston had amassed 117,602 shares, 18,224 through the 1984 Plan and 102,625 through the ISPO.

Both the 1984 Plan and the ISPO were intended to align the participants' interests with Aramark's. The "performance stock options" under the 1984 Plan were "designed to enable key ARA management to purchase shares of ARA Holding Company stock on terms that will give them a direct, sustained, and long-term interest in ARA's success." Similarly, the ISPO "provided selected management and other key employees opportunities to participate in the ownership of Aramark" and were generally granted "in connection with hires, promotions, and other forms of recognition of performance." (Emphasis added.)

As is common with such plans, the stock options awarded Houston by the board of directors allowed him to lock in a purchase price for the shares, and thus their upside potential, without assuming the risk that the shares would depreciate in value. If Aramark

prospered, the value of Houston's options would increase, and when certain conditions were met, Houston could purchase the shares at the lower options price set years before. Happily for all participants of the plans, Aramark did in fact prosper, and at the time of his retirement Houston's 117,000 shares were worth approximately $ 2,446,000. As suggested above, other participants, but not Houston, would soon become happier still.

Houston retired on June 1, 2001. Aramark was then still a privately held company, though going public had often been indicated as a possibility, in which case its shares would very likely appreciate considerably. n1 As part of his retirement planning, in May of 2001, Houston had met with Aramark's Benefits Director, Robert Bevilacqua. In that meeting the two discussed the possibility of Aramark going public. If he knew of it, Bevilacqua did not disclose that Aramark would soon announce its initial public offering. However, Bevilacqua suggested that Houston could postpone his retirement a year to see if Aramark would go public during that time. Houston declined.

Upon his retirement, the Stockholders' Agreement, which governed Houston's ownership of Aramark stock, allowed Aramark the right to repurchase, or "call," Houston's shares at their most recent appraisal price. Aramark called Houston's stock on June 14, 2001, indicating the appraisal price of $ 20.80 per share, a total of $ 2,446,121.60 for the 117,602 shares. On July 17, 2001, Aramark announced its initial public offering, which increased the value of Aramark stock to $ 46.00 per share. Since then, instead of seeing his $ 2.4m cup as overflowing, Houston has viewed his $ 5.4m cup as

less than half full. Houston's appeal to the Plan Administrator to recalculate the repurchase price to $ 46.00 was denied, and Houston, believing that Aramark breached its fiduciary obligations to him by withholding material information concerning the impending public offering, commenced this litigation.

The District Court applied this Court's decision in Oatway v. American International Group, Inc., 325 F.3d 184 (3d Cir. 2003) and determined that ERISA does not govern the stock option plans at issue because the retirement advantages offered in them are only incidental to their stated purposes of attracting and retaining key employees, and of aligning participants' interests with those of the corporation. The District Court also dismissed the common law breach of fiduciary duty claim on the grounds that Houston had waived Aramark's obligations by contract.

II. Standard of Review

We exercise plenary review in an appeal of a District Court's grant of a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). Burnstein v. Ret. Account Plan for Emples. of Allegheny Health Educ. and Res. Found., 334 F.3d 365, 374 (3d Cir. 2003). "A motion to dismiss pursuant to Rule 12(b)(6) may be granted only if, accepting all well-pleaded allegations in the complaint as true, and viewing them in the light most favorable to the plaintiff, plaintiff is not entitled to relief." In re Burlington Coat Factory Litig., 114 F.3d 1410, 1420 (3d Cir. 1997). In considering this appeal, we do not examine whether Houston will ultimately prevail, but whether he is entitled to offer evidence in support of his

claims. See id.

III. Discussion

A. ERISA Claims

Houston asserted two causes of action under ERISA: (1) pursuant to 29 U.S.C. § 1132(a)(1)(B), wrongful denial of claimed benefits stemming from the Aramark's Plan Administrator's refusal to recalculate the repurchase price of Houston's shares, and (2) pursuant to 29 U.S.C. § 1132(a)(3), breach of fiduciary duty based on Aramark's nondisclosure of information regarding the impending announcement of an initial public offering. Determining whether Houston's stock options were incentive bonuses, or rather, deferred compensation subject to ERISA, determines Houston's two causes of action under ERISA.

ERISA defines "employee pension benefit plan" in 29 U.S.C. § 1002(2)(A) as "any plan, fund, or program . . . to the extent that by its express terms or as a result of surrounding circumstances" it (i) "provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond. . . ."

By their express terms the plans were designed to align key employees' interests with those of Aramark by giving the plans' participants a stake in the company. Houston, therefore, argues that the surrounding circumstances of the plans indicate that notwithstanding their stated purpose, the 1984 Plan and the ISPO nonetheless fall within ERISA's purview because they provide retirement income or result in

income deferred until participants' employment with Aramark ends or beyond.

The question is one of perspective. Houston essentially argues that because he intended to fund his retirement with the stock proceeds, and because the plans resulted in a deferral of a portion of his income to his retirement date and beyond, the plans meet ERISA's definition of "employee pension benefit plan." This interpretation cannot stand. As the Fifth Circuit noted in a leading case on ERISA's applicability to key employee bonus plans, "Any outright conveyance of property to an employee might result in some payment to him after retirement." Murphy v. Inexco Oil Co., 611 F.2d 570, 575 (5th Cir. 1980). The design of the plan at issue, not the individual participants' intended use of the proceeds, must be the perspective from which the definition of "employee pension benefit plan" is determined. See Oatway v. American International Group, Inc., 325 F.3d 184, 189 (3d Cir. 2003) [*9] ("We agree with the legal analysis of Murphy . . . and the unbroken line of cases that have followed Murphy's reasoning.").

So understood, Aramark's 1984 Plan and ISPO are not ERISA plans under the Department of Labor's interpretation, and the plans fall squarely within this Court's holding in Oatway. According to the Department of Labor regulations, "the terms 'employee pension benefit plan' and 'pension plan' shall not include payments made by an employer to some or all of its employees as bonuses for work performed, unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees." 29 C.F.R.

§ 2510.3-2(c). Though Aramark was a privately held corporation, and though the Stockholders' Agreement placed restrictions on the transferability of shares, the deferral of payment for shares from exercised stock options by 1984 Plan and ISPO participants was not systematic. It was simply Houston's choice not to sell his 117,000 shares before he retired, as evidenced by the fact that he indeed sold over 3,000 shares in 1999. That Houston's retirement triggered Aramark's option to call his shares does not change the analysis.

The District Court's determination that the plans here are not materially distinguishable from those in Oatway is correct. Oatway held that an incentive stock option plan with a stated purpose of "providing certain key employees . . . with additional incentive to continue their efforts on behalf of [the defendant corporations]" was not an ERISA plan. Oatway, 325 F.3d at 186, 189. As they were to Mr. Oatway, the stock options granted Houston "were discretionary, given in recognition of special service, and awarded in addition to his regular compensation." Id. at 189. Though Houston elected not to sell most of his exercised stock options before Aramark called them upon his retirement, the deferral was not systematic. n2 Therefore, Aramark's 1984 Plan and ISPO are not ERISA pension benefit plans.

B. State Fiduciary Duty Claim

The waivability of fiduciary duties owed by a majority shareholder to a minority shareholder is the issue that controls the state law claim. The District Court held that by consenting to the Stockholder's Agreement, Houston waived Aramark's duty to disclose future events which would impact the value of Houston's

shares. Under Delaware law, Aramark owed Houston fiduciary duties, Ivanhoe Partners v. Newport Mining Corp., 535 A.2d 1334, 1344 (Del. 1987), but those duties were amendable by contract. See Coleman v. Taub, 638 F.2d 628, 636 (3d Cir. 1981) (noting in the context of a corporate merger that a minority shareholder can "bargain away" his interests, thus eliminating the possibility of a breach of fiduciary duty).

Houston bargained away his right to the information specifically at issue here. Houston was a party to the Stockholder's Agreement, which states that at the time a shareholder sells his shares, there maybe proposed or pending an event or a transaction that could affect the Appraisal Price of the Common Stock, and that the Appraisal Price of the Common Stock (and, accordingly, the repurchase price) may be substantially less than the fair market value as of the current date, and further acknowledges and agrees that ARAMARK may have valid business reasons, and in any case shall not be required to, disclose any event or transaction that may have occurred or be proposed or pending at the time of any such sale.

It is difficult to imagine a clearer waiver of Aramark's duty to disclose the impending announcement of its initial public offering. The District Court correctly dismissed Houston's breach of duty claim. Because we conclude that Houston waived Aramark's duty to disclose future events, we need not address the issue of the effectiveness of Houston's release included in the Share Repurchase Agreement

NO. 03-3646
CIVIL ACTION

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PETER HOUSTON
Plaintiff,

v

ARAMARK CORPORATION, 1984 STOCK OPTION PLAN OF THE ARAMARK CORPORATION,: ARAMARK OWNERSHIP PROGRAM AND ARAMARK BENEFIT PLAN ADMINISTRATOR
Defendants.

ORDER

AND NOW, this day of December, 2003, upon consideration of the Defendants' Motion to Dismiss (Doc. 8), Plaintiff's Response, and the Parties' Replies, it is hereby ORDERED that said Motion is GRANTED. All counts of the Amended Complaint are DISMISSED for the reasons stated below.

To invoke the protections and duties of the Employee Retirement Income Security Act (""ERISA"), a plan must be "designed specifically to provide employees with medical, unemployment, disability, death, vacation, or other specified benefits or to provide income following retirement." Oatway v. American International Group, 2002 U.S. Dist. LEXIS 1771, *8-9 (E.D. Pa. 2002) ("Oatway I"), aff'd, 325 F.3d 184, 188 (3d

Cir. 2003) ("Oatway II"). Plans designed to compensate or retain employees that have retirement benefits only incidentally, are generally not governed by ERISA. Oatway II at 189 (Plaintiff's "post-retirement payments were only incidental to the goal of providing current compensation"). The statute dictates that a plan will be governed by ERISA if by its express terms, or by its surrounding circumstances, it can be determined that the plan was designed to provide the benefits described above.

Plaintiff claims that the Stockholder's Agreement, the Ownership Program, and the 1984 Stock Option Plan should be governed by ERISA because they meet the requirements of 29 U.S.C. § 1002(2) (A) (i) - the "retirement income" provision - by their express terms and under the surrounding circumstances. The Court disagrees.

At the outset, Plaintiff has included a Prospectus to the Stock Ownership Program ('"Program") in its exhibits (Amended Complaint Exhibit B), and refers to that Prospectus as evidence that the Program is designed to provide retirement income, thus qualifying as an ERISA plan under the "express terms" test.1 The Court refers Plaintiff to the materials following the Prospectus in his Exhibit B, evidently a shareholder statement. That document, on page 3, states that the 2001 Aramark Ownership Program "is not subject to any provisions of the Employee Retirement Income Security Act." Although not conclusive by any means, the Court does view this statement as evidence of Defendant's intent. Plaintiff also points to a provision in the 1984 Option Plan that alleviates certain burdens on share transfer upon death or retirement. Removing

these burdens upon retirement, however, is consistent with the stated goals of the Plan - to compensate key employees and encourage long term ownership; not simply to provide retirement income. Finally, none of the plans have retirement as an absolute condition of sale. The Court holds that the stock ownership arrangements do not, by their express terms, invoke ERISA.

The 1984 Stock Option Plan and the Ownership Program were designed to attract and retain key employees, and to give those employees a continuing stake in the success of the company (Amended Complaint Exhibits A, B). The purpose of the plans was to reward key employees; the fact that retirement allowed for more rapid disposal of some shares is only incidental to the purposes of the plans. The plans were not created for the purpose of giving employees retirement income, but rather for providing current compensation. Oatway II at 189.

Plaintiff makes a novel argument that the so-called "put" provisions of the Program require a break with Oatway. The "put" provision of the Program allows a participant to compel purchase of up to thirty percent of his shares upon death or retirement when certain conditions are met. The Court rejects Plaintiff's argument; the "put" provision may make it easier to sell Aramark shares following death or retirement, but it does not necessarily serve to increase the value of the shares, nor does it change the fact that retirement is not an absolute condition precedent to sale. A plan participant is free to sell the shares, with restrictions, before retiring. The Court finds the plans at issue offer retirement advantages that are only incidental to the

purpose of providing current compensation. Oatway I at *13-14 (while Plaintiff "may have been individually permitted to exercise his options subsequent to retirement, the primary purpose of the Plan as a whole was to provide additional benefits to employees during the course of their employment."). This Court will not break with the long line of courts that have refused to find that ERISA governs stock incentive plans. See Oatway II at 189. As Claims I and II require ERISA coverage to proceed, those claims are hereby dismissed.

Plaintiff's breach of duty claim must also be dismissed. Delaware, unlike other states, allows the duties running from a majority shareholder to a minority shareholder to be modified by contract. By consenting to the Stockholder's Agreement, it is quite clear that Plaintiff waived Defendant's duty to disclose future events. The Court also holds that Plaintiff released any claims he may have had against Defendant when he signed the Repurchase Agreement2

AND IT IS SO ORDERED.

Clarence C. Newcomer, S. J.

Fn1Plaintiff actually cites the prospectus as evidence that the Stockholder's Agreement is covered by ERISA; the Court assumes that Plaintiff meant to refer to the Plan in this sentence, although the Court's reasoning would not change regardless of the document Plaintiff intended to refer to.

Fn2This Court will not engage in an analysis of the validity of the Repurchase Agreement with respect to

potential ERISA claims, which as the Parties have agreed would invoke heightened scrutiny.

Case No: 04-1103
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FOR THE THIRD CIRCUIT

PETER HOUSTON,
Appellant

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ARAMARK CORPORATION; 1984 STOCK OPTION PLAN OF THE ARAMARK CORPORATION; ARAMARK OWNERSHIP PROGRAM AND ARAMARK; BENEFIT PLAN ADMINISTRATOR

SUR PETITION FOR REHEARING

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision. of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majoity of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc is denied.

November 22, 2004